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No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1983

STEPHEN H. DEMAREST,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the denial of retained counsel to applicants for veterans' benefits, imposed by a $10 limit on attorneys' fees under 38 U.S.C. § 3404 and enforced by criminal sanctions, is offensive to the Due Process Clause of the Fifth Amendment of the Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner is Stephen H. Demarest.

Respondents are the United States and the Veterans' Administration.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Stephen H. Demarest ("Demarest") requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 718 F.2d 964 (9th Cir. 1983), is Appendix A to this petition. The decision of the United States District Court for the Western District of Washington is Appendix B. The Findings and Decision of the Board of Veterans Appeals is Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 20, 1983. This petition for certiorari was timely filed and this Court's jurisdiction invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

* * *

38 U.S.C. § 211 provides in part:

§ 211. Decisions by Administrator

(a) the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

* * *

38 U.S.C. § 3404 provides in part:

§ 3404. Recognition of agents and attorneys generally

. . . .

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees–

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

* * *

38 U.S.C. § 3405 provides:

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary

any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

STATEMENT OF THE CASE

Petitioner Demarest is an American veteran who suffered two disabling injuries during his four year tour of duty with the U.S. Air Force.[1]

After his honorable discharge in 1980, Demarest applied for benefits from the Veterans' Administration ("VA"). The VA determined that Demarest's injuries were service-connected but denied his claim, finding that these injuries were not disabling to a compensable degree.

Demarest sued in the United States District Court for the Western District of Washington alleging that the VA was arbitrary and capricious in denying his claim for disability compensation. Demarest also challenged the constitutionality of the statutorily imposed $10 limitation on attorneys' fees under 38 U.S.C. §§ 3404 and 3405. Because of this limitation he was unable to pay and retain counsel to represent him. 38 U.S.C. § 3404(c) limits to $10 per claim the amount of attorneys' fees payable for representation of a veteran before the VA on a disability claim, and 38 U.S.C. § 3405 provides criminal (felony) penalties, including imprisonment at "hard labor," for violation of the attorneys' fees limitation.

The District Court granted summary judgment for the government, holding that it was without jurisdiction to consider Demarest's claims for benefits, and rejecting Demarest's contentions that the attorneys' fees limitation of 38 U.S.C. § 3404 violated his rights to due process and

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1. Demarest commenced this action while attending law school and represented himself *pro se* through the Court of Appeals. The undersigned agreed to represent Demarest in this petition for a writ of certiorari. Demarest has provided assistance in the drafting of this petition.

equal protection, relying on *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd sub nom. Gendron v. Levi*, 423 U.S. 802 (1975). App. B at 2.

The Court of Appeals affirmed, holding that the District Court had no jurisdiction to consider Demarest's challenge to the VA's disposition of his disability claims because 38 U.S.C. § 211(a) "provides that all decisions of the VA concerning veterans' benefits are final; no federal court will have jurisdiction to review them." App. A at 2. The appellate court acknowledged that under *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974), Section 211 did not bar constitutional challenges to the veterans' benefits laws and therefore presented no jurisdictional barrier to Demarest's challenge to the statutory attorneys' fees limitation. App. A at 3.

Rejecting Demarest's contention that these provisions violated his right to due process in consideration of his disability claims before the VA, the Court of Appeals held that this Court's summary affirmance in *Gendron v. Levi*, 423 U.S. 802 (1975), *aff'g sub nom. Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975), was controlling. App. A at 3-6. The summary judgment was vacated and remanded for entry of judgment of dismissal for lack of jurisdiction on Demarest's claim for benefits and the remainder of the judgment, rejecting the constitutional challenge to the fees limitation, was affirmed. App. A at 6.[2]

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2. Another action challenging the $10 fee limit, as applied to particular complex claims, is pending in the Northern District of California. *National Ass'n of Radiation Survivors v. Walters*, No. C-83-1861-MHP (N.D. Cal.) (defendant's motion to dismiss denied, Oct. 21, 1983; decision on publication pending).

REASONS FOR GRANTING THE WRIT

I. The $10 Attorneys' Fees Limitation Violates the Due Process Clause.

A. The Denial of Retained Counsel in Disability Compensation Proceedings Before the Veterans' Administration Deprives Applicants for Veterans' Benefits of Procedural Due Process.

Procedural due process imposes a constraint on governmental power to deprive individuals of liberty or of a property interest within the meaning of the Due Process Clause of the Fifth Amendment. This mandate fundamentally includes procedural protections to ensure a fair hearing before governmental benefits are denied or terminated.

The VA is a governmental agency with unique powers. VA decisions on claims for veterans' benefits are final; 38 U.S.C. § 211(a) provides that the decisions of the VA are not subject to judicial review.[3] For this reason the need to ensure fairness within the administrative process is compelling. The right to retain independent legal counsel is essential to ensure fair hearings and a perception of fairness.

1. Applicants Have a Constitutionally Protected Property Interest in Their Statutory Entitlement to Disability Benefits.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that welfare recipients have a property interest in welfare benefits and are entitled to certain procedural protections before termination of their benefits. "[S]uch benefits are a matter of statutory entitlement for persons qualified to

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3. In the courts below Demarest challenged the constitutionality of the statutory provision precluding judicial review. Because *Johnson v. Robison*, 415 U.S. 361 (1974), upholds the constitutionality of the prohibition of judicial review of benefits' decisions in particular cases, this issue is not raised in this petition.

The Senate has passed a bill, S. 636, 98th Cong., 1st Sess. (1983), to provide judicial review of VA decisions on benefit claims; bills H.R. 1959 and H.R. 3300 on this subject are now pending in the House of Representatives.

receive them." *Id.* at 262. Recipients were entitled to a pre-termination hearing with notice, which included the right to be represented by retained counsel. *Id.* at 270-71.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), an assistant professor hired for the term of one year alleged that he possessed a property interest in continued employment. This Court denied his property interest, holding:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . .
>
> Thus, the welfare recipients in *Goldberg v. Kelly*, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Id. at 577.

These rules have been applied to the VA, in a decision that VA benefits cannot be terminated without a pre-termination hearing because the recipients had a protected property interest. *Plato v. Roudebush*, 397 F. Supp. 1295, 1308 (D. Md. 1975). *See also Devine v Cleland*, 616 F.2d 1080 (9th Cir. 1980).

This Court's recognition that individuals with a statutory entitlement have a constitutionally protected interest has been extended to applicants for statutory benefits. In many administrative contexts, courts have held that applicants, like recipients threatened with termination, have a property interest based on statutory entitlement to benefits.[4] More

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4. *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (under *Goldberg* "summary denial of welfare assistance cannot be distinguished from summary termination," welfare applicant has statutory entitlement property interest, and procedural protections found in *Goldberg* apply to all stages of welfare process "whenever the proposed administrative action contemplates the denial or termination of statutorily created

specifically, applicants for disability compensation benefits have been found to have a property interest.[5]

38 U.S.C. § 331 outlines the requirements for the awarding of veterans' disability benefits under the heading "Basic Entitlement." The applicant must establish active duty military service, a discharge other than dishonorable, and a service-connected disability that was not the result of his or her own willful misconduct.

Demarest completed four years of active duty service and was honorably discharged. During his service he suffered personal injuries and was disabled. The VA made a line of duty determination, established service connection and concluded that willful misconduct was not involved. Demarest thus has a "legitimate claim of entitlement" based on statutory eligibility requirements for veterans' disability benefits. The government cannot deprive him of this property interest without due process of law.

Footnote 4 (Con't)

welfare benefits"); *Shaw v. Weinberger*, 395 F. Supp. 268 (W.D.N.C. 1975) (applicant for Social Security income possesses property interest despite discretion left to Secretary); *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) ("denials [of Social Security benefits] do not necessarily deserve less due process than terminations"); *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979) ("authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements [for general relief]"); *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982) (*Roth*, *Griffeth* mandate that applicants for subsidized housing have a property interest because of standards determining eligibility).

5. For example, in *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 489 (1980), the Third Circuit held that due process attaches to the determination of eligibility at application for, or after receipt of, disability benefits.

Similarly, in *Davis v. United States*, 415 F. Supp. 1086, 1090-91 (D. Kan. 1976), the court analyzed the property interest of an applicant for disability benefits for injuries allegedly suffered while employed in a federal prison hospital:

> [T]he applicant's interest consists of a claim authorized by statute and regulations to secure compensation for alleged employment

The three judge district court in *Gendron v. Saxbe*, 389 F. Supp. 1303, followed by the Ninth Circuit here, held that the plaintiff did not possess the requisite property interest in veterans' benefits. 389 F. Supp. at 1306. *Gendron* may have interpreted the property interest defined in *Goldberg* and *Roth* to encompass only recipients of veterans' benefits and not applicants. But this cannot properly be reconciled with *Goldberg* and *Roth*, nor with the consensus of judicial opinion. *See* notes 4, 5, *supra*.[6]

Footnote 5 (Con't)

> disabilities of prison origin that may severely restrict, and sometimes eradicate, his earning potential upon release into society. *Although at the application stage of the proceedings neither plaintiff nor a claimant in his position has yet been administratively adjudged entitled to receive benefits under the regulatory scheme, an applicant nonetheless possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's due process clause.* . . . This property interest is one of substantial importance to the plaintiff, as its arbitrary denial could leave him with an uncompensated disability of lifelong duration and condemn him to "suffer grievous loss."

(citations omitted) (emphasis added). The court rejected the government's arguments that applicants for statutory benefits are unworthy of due process protection, observing: "Indeed, other language in *Roth* itself expressly forecloses such a restrained interpretation of a legitimate property interest." *Id.*

6. The *Gendron* district court opinion can also be read to hold only that the plaintiff in that case, who had not proven a service connection for his alleged disability, had no property interest. 389 F. Supp. at 1306. That case is inapplicable here because the service connection for Demarest's injuries was established.

The Ninth Circuit found this important distinction irrelevant, App. A at 4-5, and held that the Supreme Court's affirmance of *Gendron* "necessarily" represents one of two conclusions: "that Gendron did not have a constitutionally protectible [sic] property interest in the disability benefits sought," or, alternatively, "the Court may have concluded that a property interest existed but the fee limitation did not violate the veteran's right to procedural due process." App. A at 5.

In addition to *Gendron's* different facts and its possibly erroneous treatment of applicants' interests, certain novel and complex bases for VA

This Court in *Goldberg* established that property rights based on statutory entitlement to benefits are protected by the Due Process Clause of the Fifth Amendment. Federal courts have almost universally held that applicants for statutory entitlements also have a protected property interest. This Court on plenary review should confirm that principle.

2. Denial of Retained Counsel Violates the Process That Is Due Applicants for Veterans' Benefits.

Because Demarest has the requisite property interest, the inquiry shifts to what process is due based on a flexible

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Footnote 6 (Con't)

disability claims as to which the assistance of counsel would be particularly important, *see* p. 11 *infra*, had not emerged in any significant way by the time of the *Gendron* decision in 1975. For example, the first congressional hearing on the effect of veterans' exposure to the herbicide used in the Vietnam war and containing the deadly contaminant dioxin, known commonly as Agent Orange, was not held until 1978. Hearing, "Herbicide 'Agent Orange'," Before the Subcomm. on Medical Facilities and Benefits of the Comm. on Veterans' Affairs, U.S. House of Representatives, 95th Cong., 2d Sess. (Oct. 11, 1978). The first Congressional hearing on the effect of veterans' exposure to atomic radiation was not held until 1979. Hearing, "Veterans' Claims for Disabilities for Nuclear Weapons Testing," Before the Comm. on Veterans' Affairs, U.S. Senate, 96th Cong., 1st Sess. (June 20, 1979). And the emotional injury suffered by many Vietnam veterans, called post traumatic stress disorder, was not recognized as a psychological disorder by the American Psychiatric Association until 1980. Diagnostic and Statistical Manual of Mental Disorders (3rd ed., 1980). VA regulations require that mental disorders, including those used as a basis for benefits claims, be diagnosed in accordance with this manual. 38 C.F.R. §§ 4.125 and 4.126. These developments should be taken into account in determining the requirements of due process, a constitutional doctrine that must be applied flexibly to accommodate changing conditions.

Finally, even if *Gendron* is controlling in the Ninth Circuit, this Court has never given plenary review to the issues of the procedural protections due applicants for veterans' benefits. A summary affirmance has relatively little precedential weight for this Court. As explained in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 308 n.1 (1976): "Our cursory consideration in those cases [summary affirmances] does not, of course, foreclose this opportunity to consider more fully that question." *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

balancing test weighing the interests of applicants for veterans' benefits and the government. *See. e.g., Mathews v. Eldridge,*424 U.S. 319, 334-35 (1976); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Goldberg v. Kelly*, 397 U.S. at 263-71.

a. The applicant's interest

The $10 fees limitation denies veterans retained counsel absent representation *pro bono publico*. The government must concede that a $10 fees limitation practically prohibits a disabled veteran or a survivor from retaining any counsel who wish to be compensated for services.

The ability to retain counsel is a major part of procedural due process in an administrative setting. In *Goldberg* this Court held that the pre-termination hearing included a right to be represented by counsel:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." [*Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)]. We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.

397 U.S. at 270-71.

Federal courts have reached similar conclusions in various administrative settings. To illustrate, in *Ressler v. Pierce*, 692 F.2d 1212, 1219 (9th Cir. 1982), the Ninth Circuit held that an applicant for public housing has a due process right to retain and be represented by an attorney. In *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970), the court applied the procedural protections described in *Goldberg*, including the right to counsel, to all stages of the welfare process, including application. In *Davis v. United States*, 415 F. Supp. 1086 (D. Kan. 1976), the court held that a former prison inmate applying for disability compensation had a constitutional right to retain an attorney. Thus there is a

recognized procedural right to use retained counsel in administrative hearings.[7]

If applicants for benefits have a procedural right to a hearing on their entitlement, they have a right to a meaningful hearing grounded on fair procedures. The aid of retained counsel for an applicant for veterans' benefits is conducive to reliable determination of entitlement to benefits. A lawyer may marshal facts, ensure that important rights are not waived or abandoned, and advance the applicant's interest on questions of regulatory interpretation and law. Claims may encompass difficult substantive issues of medical proof and causation. The 1982 Annual Report of the VA also notes increasingly complex claims for Agent Orange, atomic radiation, prisoners of war, and post-traumatic stress disorders. *See* App. D at 5-6. Even in relatively routine disability cases like that of Demarest, many complex issues of regulatory law and proof are presented, as may be seen by a review of the Findings and Decision of the Board of Veterans Appeals on Demarest's claim. *See* App. C and note 6, *supra*.[8]

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7. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-91 (1973), rejecting a general requirement of counsel in probation revocation hearings is not to the contrary because that case involved the issue of appointed, not retained, counsel. As this Court there stated:

> Since respondent did not attempt to retain counsel but asked only for appointed counsel, we have no occasion to decide in this case whether a probationer or parolee has a right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.

Id. at 783 n.6.

8. This action was commenced in the federal district court before the final decision of the Board of Veterans Appeals ("BVA"), in App. C, was rendered. The Ninth Circuit, by its Order Denying Appellant's Post-Argument Motion (filed September 26, 1983), denied Demarest's motion to file a supplemental brief after argument containing "facts and law" including the BVA decision entered August 9, 1983, and so the BVA's decision is not of record. However, this Court may take judicial notice of the BVA decision. F.R.E. § 201(b)(2). *See* 21 C. Wright & K. Graham, *Federal Practice and Procedure*, § 5106, at 505 ("The most frequent use

These principles apply with even greater force because veterans disabled through military service may have lost all or much of their ability to earn a living. "[A]rbitrary denial could leave [a veteran] with an uncompensated disability of lifelong duration and condemn him to 'suffer grievous loss.' " *Davis*, 415 F. Supp. at 1091 (citation omitted). Also, veterans cannot sue under the Federal Tort Claims Act for disabilities resulting from military service. *Feres v. United States*, 340 U.S. 135 (1950). Compensation from the VA is generally their sole remedy for service-connected disabilities. Perhaps more importantly, the VA's decision is final. *See* note 3, *supra*. In *Davis*, the court stressed the exclusive nature of the administrative remedy in reaffirming a right to a hearing and representation of counsel:

> Since 18 U.S.C. § 4126 provides the exclusive remedy for collection of benefits by an inmate, a claimant has no other means of redress should he be the victim of an arbitrary denial and thus may be condemned to endure the draconian effects of an uncompensated disability.

415 F. Supp. at 1099.

In contrast to the simple procedural process of applying for veterans' benefits in the 1860's when the attorneys' fees limitation was instituted, the modern application process is complex. In the event of denial of a claim, the applicant must then file a Notice of Disagreement and formulate a basis for an Appeal from the Statement of the Case provided by the VA. *See* 38 C.F.R. §§ 4005 *et. seq.* The Appeal must conform to regulatory requirements or risk dismissal.

Veterans' service organization representatives who assist applicants for veterans' benefits are doubtless able and well motivated. But without legal training these representatives may be unable to represent veterans effectively in particular cases. They may or may not perceive relevant legal issues

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Footnote 8 (Con't)

of judicial notice of ascertainable facts [under F.R.E. § 201 (b)(2)] is in noticing the content of court records."). Accordingly, we have included that decision as App. C.

and they certainly are disadvantaged, as contrasted with lawyers, in marshalling facts and arguments in aid of the applicant. By contrast, it is undisputed that the VA employs legal counsel to process claims. *See* VA 1982 Annual Report, App. D at 7 ("Among the 17 sections there were 33 legal . . . members. Supporting the sections [were] . . . 107 staff attorneys . . . ."). And it therefore seems fair to conclude that permitting applicants for veterans' benefits to retain counsel to assist them can only aid in a fair resolution of claims and increase the reliability of the claims determination process.[9]

Moreover, the option to choose to retain independent counsel will also enhance veterans' perceptions of the fairness of the proceedings. Applicants will better appreciate the fairness of the agency process if they have the option to retain counsel who can advise them of its legal adequacy. Institutions that are closed to such scrutiny do not foster the essential sense of fairness that public bodies must seek to promote.

The interest of veterans in retaining counsel when they deem it appropriate also raises an issue of transcending importance, the right of informed choice in a free society. Institutions or procedures that threaten personal liberty and free, informed choice should be suspect. Our Constitution does not favor statism over the dignity of the individual.[10]

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9. Although some veterans' service organizations who provide service representatives on claims in the VA may not urge a need for counsel, other veterans' organizations support the right to choose to retain counsel. *See* Congressional testimony of John F. Terzano of Vietnam Veterans of America, App. E.

10. As this Court has stated in *Faretta v. California*, 422 U.S. 806 (1975), while finding that a criminal defendant has a Sixth Amendment right to conduct his own defense, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." 422 U.S. at 833-34. Such choice must be honored out of "that respect for the individual which is the lifeblood of the law." 422 U.S. at 834 (citing *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

b. The government's claimed interest.

The government has defended the attorneys' fees limitation as a protection for applicants to avoid depletion of benefits awarded. The claimed interest is one of the applicant, asserted by the government. All the petitioner seeks is the right to retain counsel at his own expense, not to have the government provide such counsel. The government protests that it is protecting veterans from having to share their benefits with attorneys, and asserts that adequate representation by service organizations renders attorneys for veterans unnecessary. But this paternalism is misplaced where benefits have been denied to veterans who believe that their best interests would have been better served had they had the option of retaining counsel to represent them. Also, the statute does not merely limit depletion of benefits; it even prohibits veterans from paying their counsel with their own funds to gain better representation.

The many instances in which retention of counsel is allowed in similar administrative proceedings diminish the credibility of the government's asserted interest. Moreover, in contrast to the government's claimed concern for the veterans who must rely solely on disability benefits from the VA, qualified officers and enlisted personnel may use counsel to seek military retirement or separation benefits under 10 U.S.C. § 1201 *et seq.* *See* note 14, *infra.* Finally, the government's asserted interest is certainly unusual, and is contradicted by the congressional policies expressed in many other contexts where not only are retained counsel permitted but also an award of attorneys' fees is made possible by statute, thus facilitating the use of counsel. For a list of federal statutes authorizing award of attorneys' fees in dozens of contexts, see Appendix A in *Ramos v. Lamm*, 359 F. Supp. 730, 755-57 (D. Colo. 1982).

Even if the government has a legitimate interest in limiting recovery for attorneys, such limitation must be reasonable and not act as an effective prohibition against counsel. Certainly, less drastic alternatives are available to guarantee that veterans' disability benefits not be depleted

unreasonably during VA proceedings. In similar contexts, statutory limitations on the award of attorneys' fees have been established on bases that protect claimants while permitting the retention of counsel. As examples, under the Social Security Act attorneys' fees must be court approved and are limited to 25 percent of the past due benefit recovery, 42 U.S.C. § 406(b)(1); the Federal Tort Claims Act imposes a similar percentage limit on fees, 28 U.S.C. § 2678; the Federal Employees' Compensation Act provides a similar reasonable restriction, permitting attorneys' fees when "approved" by the Secretary, 5 U.S.C. § 8127(b). Similarly, each of three bills that have passed in the Senate relating to VA disability proceedings have provided for the Administrator of Veterans' Affairs to approve reasonable attorneys' fees. S. 330, 96th Cong., 1st Sess. (1979); S. 349, 97th Cong., 2d Sess. (1982); S. 636, 98th Cong., 1st Sess. (1983). These bills show both that less restrictive means may advance the asserted governmental interest and that Congress, for whatever reasons, has been unable to adopt them.

It may be inevitable that if removal of the attorneys' fees limitation results in more successful claims because of more effective representation of applicants' interests, government expenditures will increase. But denial of valid claims because of inadequate representation is not a legitimate government interest, and has not been urged by the government. The possibility of any increased administrative cost resulting from increased effective hearings might be worthy of some consideration, but would not here justify a denial of increased procedural protection that surely would enhance the reliability of determinations. *Goldberg*, 397 U.S. at 266.

The historical antecedents of the challenged attorneys' fees limitation undercut the current viability of the interest now asserted by the government in denying retained counsel to applicants.[11] When set in earlier times, the dollar limit may

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11. *See generally* Hearings on S. 330 Before the Senate Committee on Veterans' Affairs, 96th Cong., 1st Sess.(1979). The weight of historical evidence discussed shows an intent to facilitate the use of lawyers in aid

not have precluded and perhaps facilitated the proper use of counsel, guarding only against fraud and overreaching. In consideration of the value of today's dollars the limit no longer regulates but precludes retained counsel. The organized bar has developed procedures to avoid fraud or overreaching, eliminating any substantial justification on that ground. *See* ABA Model Code of Professional Responsibility, ABA Model Rules of Professional Conduct and related state bar associations' codes of professional responsibility. Thus the impact of the fee limitation has become ill-advised, draconian in application and unfair in concept. If ever this law was justified, it now is not needed. A realistic, reasonable limitation on attorneys' fees could serve all legitimate government interests to the satisfaction of everyone, while permitting disabled veterans or their survivors the procedural right to retain counsel paid from their own funds if desired.

* * *

The interests of applicants for veterans' benefits in retaining a lawyer outweigh any interests of the VA in denying applicants that option.

This Court should grant review to evaluate the pertinent interests and to determine what process is due applicants in VA disability proceedings.

Footnote 11 (Con't)

of the essentially clerical preparation of claims, before the development of modern procedural and substantive complexities, while guarding against fraud by claims agents and attorneys who "were apparently charging the upper limit of fees for work that was essentially clerical in nature". *Id.* at 17. Historical references mention "mercenary claim agent leeches," and "sharks who prey upon pensioners." *Id.* at 16-17. Thus the intent of Congress seems to have been only to cure excess without impairing the use of attorneys for what was then largely clerical assistance. The fee limit today precludes aid of counsel even on initial application for claims. Moreover, insofar as there may have been an intent to exclude attorneys from presenting claims apart from filing the forms, such intent could no longer be appropriate for the reasons discussed herein and seems also to be an affront to the recognized value of retained counsel in civil matters.

B. The $10 Attorneys' Fees Limitation Imposed by 38 U.S.C. § 3404 Also Violates Substantive Due Process.

The attorneys' fees limitation imposed by 38 U.S.C § 3404 impermissibly restricts the rights of veterans and their survivors to retain counsel in violation of substantive due process. This Court never has decided the substantive due process constitutionality of the attorneys' fees limitation as it pertains to veterans denied the right to retain counsel.[12]

1. The Challenged Restriction Unjustifiably Abridges a Fundamental Right.

Where a government act infringes a fundamental right, due process requires that the act be justified by a compelling interest and be narrowly drawn to serve that precise interest. *E.g., Carey v. Population Services International*, 431 U.S. 678, 686 (1977). This Court has implicitly recognized that the right to retain counsel in an administrative hearing is fundamental, and now should expressly so hold.

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12. Where issues are neither raised before nor considered by the Court of Appeals, this Court ordinarily will not consider them. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Demarest raised a "due process" claim below, albeit procedural due process. Whether this Court generally would require specific due process grounds to be raised below, it retains the power to decide this issue. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). There is no issue of comity with the states since the case arises on review from the federal courts.

This Court has held predecessor statutes constitutional as enforced against attorneys who were paid an amount in excess of the statutory allowance. *Hines v. Lowrey*, 305 U.S. 85 (1938); *Margolin v. United States*, 269 U.S. 93 (1925). Those decisions of this Court are inapposite, involving no veteran's claim of a right to retained counsel, and contain no significant constitutional analysis because they were written before this Court's refinement of the due process principles applicable here. *Hines* and *Margolin* have been incorrectly cited and followed without analysis in *Hoffmaster v. Veterans' Administration*, 444 F.2d 192 (3d Cir. 1971) and *Holley v. United States*, 352 F.Supp. 175 (S.D. Ohio 1972), which rejected veterans' challenges to the constitutionality of the attorneys' fees limitation.

From the founding of this country, the importance of the right to retain counsel has been recognized:

> Either party . . . has a natural right to plead his own cause; this right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a council [sic], is an appendage to the natural right [of self-representation] . . . ."

"Thomas Payne on a Bill of Rights, 1777," *reprinted in* 1B Schwartz, *The Bill of Rights: A Documentary History*, n.37, at 316 (1971), *quoted in Faretta v. California*, 422 U.S. 806, 830 n.37 (1975).

In the criminal context, *Gideon* and its progeny highlight the importance of the right to be represented by appointed counsel: "This noble ideal [to assure fair trials] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

This Court's decision in *In re Gault*, 387 U.S. 1 (1967), in the setting of the juvenile court system, recognized that unrepresented persons in noncriminal proceedings involving the risk of loss of liberty were constitutionally entitled to the assistance of counsel. This Court stressed:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him" [citing *Powell v. Alabama*, 287 U.S. 45 (1932)].

387 U.S. at 36.

The Supreme Court's endorsement in *Gault* of the right to appointed counsel in noncriminal proceedings that threaten liberty was followed in *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), and in *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971), in involuntary commitment proceedings.

An even broader rule applies to the right asserted here to use *retained* counsel. This case does not involve any issue of appointed counsel, but, instead, solely the issue of a procedural right of veterans to retain counsel of their choice to be paid from their own funds. The right to a retained attorney in all civil cases always has been assumed. As Justice Sutherland emphasized in *Powell v. Alabama*, 287 U.S. 45, 69 (1932):

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

This Court also has endorsed the fundamental benefits of and the right to retained counsel in the civil administrative context. As *Goldberg v. Kelly* stressed:

> "The right to be heard would be, in many cases, of little avail, if it did not comprehend the right to be heard by counsel." We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.

397 U.S. at 270-71 (citation omitted).

In view of the longstanding recognition of the importance of the right to counsel in our society, restrictions on that right should be given "strict scrutiny."[13] And clearly the government's alleged interest in avoiding depletion of veterans' benefits is not compelling. While Congress may have an interest in limiting the amount paid to a lawyer by

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13. The fee limitation statute also infringes upon separate and distinct fundamental First Amendment rights such as speech, association, and the right to petition. *See, e.g., United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222-23 (1967); *Schneider v. Smith*, 390 U.S. 17, 25 (1968). This infringement of First Amendment rights also warrants strict scrutiny.

a veteran seeking disability benefits, the $10 fees limitation is arbitrary. An aim to prevent *excessive* attorneys' fees paid by veterans is not even rationally served by the $10 restriction which prohibits *any* reasonable fees and thereby effectively bars retained counsel. The statute's prohibition is grossly overinclusive, and its goals can be served by less drastic and restrictive means. *See* discussion, *supra*, at 14-16.[14]

2. Alternatively, the Fees Limitation Has No "Rational Basis."

If the right to retain counsel is not fundamental, there still should be heightened scrutiny because of the important interests at issue. But even under the least rigorous review, for the reasons stated above this Court should decide that the fees limitation is not supported by a "rational basis." *See, e.g., United States v. Carolene Products*, 304 U.S. 144 (1938).

II. This Court Should Give This Case Plenary Review Because of Its Importance to Veterans and Their Beneficiaries.

The importance of this case is enhanced by the number of disabled veterans, beneficiaries and survivors that are affected by the prohibitive attorneys' fees limitation.

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14. Refuting the government's asserted interest, no similar government solicitude exists with respect to benefits for retirement or separation from the military due to physical disability under 10 U.S.C. § 1201 *et seq.* On claims for such benefits, attorneys may be retained and paid without restriction throughout the administrative process, which ends when a claimant secures a decision from an appropriate Board for Correction of Military Records ("BCMR"), 10 U.S.C. § 1551 *et. seq.*, and any subsequent judicial process, since decisions of the BCMRs are not, unlike those of the VA, barred from judicial review. This disparate treatment of categories of former military personnel raises independent issues of "equal protection" as incorporated in the Fifth Amendment's Due Process Clause. *E.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).

As a practical matter, while claims for benefits based on disabilities arising out of past military service may be made either to the VA or a BCMR, various reasons make the VA claim the overwhelming preference of claimants. For example, military disability benefits depend on the rank the claimant held, *see* 10 U.S.C. §§ 1212 and 1401 (pay calculations start with "monthly basic pay"), while VA benefits are unrelated to rank.

In 1982, more than 2.6 million veterans and survivors (2,274,634 disability compensation cases and 350,357 service-connected death cases) received compensation from the VA for service-connected death and disability claims. Annual Report of the Veterans' Administration, 1982 at 69.[15]

At the end of fiscal year 1982 there were 59,776 appeals from denial of benefits pending before the VA's Board of Veterans' Appeals. During fiscal year 1982 the VA disposed of 61,352 appeals: 21.3 percent were allowed, 41.4 percent were denied, and the rest were withdrawn or closed. In these appeals 86 percent of the appellants were represented by a service organization, and only two percent were represented by claims agents, some of whom were attorneys. 12 percent had no representation. *Id.* at 138-139.

* * *

Veterans or their survivors, and their beneficiaries, bear the consequences of an administrative determination concerning their claims for disability compensation. They, therefore, are entitled to make an informed choice to retain counsel to represent them, subject only to reasonable limitations on counsel's fees.

The sacrifices veterans make for their country need no recitation here. Those sacrifices demand that any law which impairs the relationship that veterans may have with the agency mandated to serve their needs be subject to the most careful scrutiny, else unequal and unlawful conditions on that relationship could demean what it is intended to honor.

This Court should now decide, upon a full review, whether each disabled veteran has a due process right to retain counsel in VA disability proceedings.

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15. Veterans of military service comprise 28.5 million Americans, and potential beneficiaries of veterans' benefits number 83.8 million people, 36 percent of our Nation's population. Annual Report of the Veterans' Administration, 1982 at 1, 5, reproduced in App. D at 1, 4.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to review the decision of the Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN H. DEMAREST, Plaintiff-Appellant,	)	No. 83-3649
	)	D.C.#C82-364T
vs.	)	*OPINION*
UNITED STATES OF AMERICA, Defendant-Appellee.	)	(Filed October 20, 1983)

Appeal from the United States District Court
for the Western District of Washington
District Judge Jack E. Tanner, Presiding
[Argued and Submitted August 3, 1983]

Before: WRIGHT, SKOPIL, and POOLE, Circuit Judges.

WRIGHT, Circuit Judge:

Demarest's challenge to the Veterans' Administration's (VA) handling of his disability claims was rejected by the district court. The issues here are whether the handling of his claims is judicially reviewable and whether the statutory limitation on attorneys' fees payable in VA disability cases is constitutional.

During a four-year tour with the United States Air Force, Demarest suffered two injuries: one to his left great toe and one to his back. After his honorable discharge, Demarest filed claims for disability compensation for those injuries.

The VA denied the claims. It found that the injuries were service connected, but not disabling to a compensable degree.

JURISDICTION

Demarest's challenge to the VA's handling of his claims was pleaded as a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80. The district court held that jurisdiction under the FTCA had not been established and granted summary judgment for the VA on that claim.

Demarest challenges the appropriateness of disposition by summary judgment when jurisdiction was lacking. It is true that dismissal is the appropriate disposition if subject

matter jurisdiction is absent. *Capitol Industries-EMI, Inc. v. Bennett*, 681 F. 2d 1107, 1118 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982). The remedy is simple: an appellate court affirming the conclusion that jurisdiction is lacking should vacate the summary judgment and remand for entry of judgment of dismissal. *Id.*

Demarest concedes that he did not properly invoke jurisdiction under the FTCA. However, he contends that jurisdiction is conferred by other statutes. Dismissal for lack of jurisdiction is not warranted to the extent that the complaint pleads facts from which federal jurisdiction clearly may be inferred. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-8 n.6 (1978); *see Mir v. Fosburg*, 646 F.2d 342, 346-47 (9th Cir. 1980); *Harary v. Blumenthal*, 555 F.2d 1113, 1115 n.1 (2d Cir. 1977).

The district court had no jurisdiction to consider Demarest's challenge to the handling of his claims. Title 38 of the United States Code, section 211(a), provides that all decisions of the VA concerning veterans' benefits are final; no federal court will have jurisdiction to review them. 38 U.S.C. § 211(a). Section 211 has been construed as a prohibition on judicial review of the VA's administration of veterans' benefits statutes, interpreting or applying provisions of the statutes in the context of a given set of facts. *Johnson v. Robison*, 415 U.S. 361, 367 (1974). Demarest's challenge to the VA's handling of his claims clearly falls within this prohibition, as he seeks review of the VA's treatment of his individual claims.

Demarest's contention that the Administrative Procedure Act confers jurisdiction is clearly without merit. That Act has no jurisdictional effect. *Califano v. Sanders*, 430 U.S. 99, 104-07 (1977). We have considered his other arguments that judicial review is necessary, but find nothing to overcome the plain language of section 211. His contention that the VA's actions were arbitrary and capricious does not change the essential nature of the action as a challenge to the VA's administration of an individual claim. *See Devine v. Cleland*,

616 F.2d 1080, 1084 (9th Cir. 1980); *Moore v. Johnson*, 582 F.2d 1228, 1232 (9th Cir. 1978).

However, section 211 does not bar constitutional challenges to the veterans' benefits laws. *Johnson v. Robison*, 415 U.S. at 366-74. It presents no jurisdictional bar to the consideration of Demarest's challenge to the statutory attorneys' fee limitation.

The VA alleges that the attorneys' fee limitation challenge also was rejected for lack of jurisdiction. The district court's order provided in part:

> (a) Plaintiff has not complied with the Federal Tort Claim Act requirements of 28 U.S.C.A. Section 2675. Accordingly, this court lacks jurisdiction to proceed on these claims.
>
> (b) Plaintiff's claim that the restrictions of 38 U.S.C.A. Section 3404 violates [*sic*] his due process and equal protection rights (to pursue his service connected disability claims under 38 U.S.C.A. Section 3401) are without merit. *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975); *aff'd sub nom Gendron v. Levi*, 423 U.S. 802 (1975).

The order rejects the fee challenge on the merits.

The VA argues that the fee challenge cannot be reviewed pursuant to federal question jurisdiction, 28 U.S.C. § 1331, because it presents no substantial federal question. A federal question is jurisdictionally insubstantial if it is patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 70-71 (1978). Demarest's fee challenge is not so completely devoid of merit that it presents no substantial federal question, as our discussion of the merits of that challenge will demonstrate. *See Gendron v. Saxbe*, 501 F.2d 1087 (9th Cir. 1974).

ATTORNEYS' FEE LIMITATION

Title 38 of the United States Code, section 3404(c), limits to ten dollars ($10) per claim the amount of attorneys' fees payable by a veteran for representation before the VA on

a disability claim. Section 3405 provides criminal penalties for violation of the attorneys' fee limitation. 38 U.S.C. § 3405. Demarest contends that these provisions violate his right to procedural due process in the consideration of his disability claims before the VA. *See* U.S. Const. amend. V.

The Supreme Court's summary affirmance in *Gendron v. Levi*, 423 U.S. 802 (1975), *aff'g sub nom. Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975), is controlling. Gendron alleged that the ten dollar fee limitation violated his right to both procedural due process and equal protection. The district court there applied the procedural due process test set out in *Goldberg v. Kelly*, 397 U.S. 254 (1970): is the interest a constitutionally protected property or liberty interest and, if so, does the recipient's interest in avoiding loss outweigh the government interest in retaining the challenged procedure? *Id.* at 262-63. It concluded that Gendron had no property interest in an unproven disability claim. 389 F. Supp. at 1306.

However, the court went on to hold that the procedures provided by Congress for the administration of disability claims, including the limitation on attorneys' fees, satisfied the requirements of procedural due process. *Id.* at 1306-08. The Supreme Court summarily affirmed the decision. *Gendron v. Levi*, 423 U.S. 802 (1975).

Demarest contends that this case is distinguishable factually from *Gendron*, and that the summary affirmance in that case did not resolve the procedural due process challenge presented here. We disagree.

The factual differences noted have no legal significance. The length of military service and character of discharge are irrelevant to entitlement, because Gendron and Demarest both served and neither was discharged dishonorably. *See* 38 U.S.C. § 331. The alleged lateness of Gendron's claim is irrelevant because no statute of limitation applies. It also is irrelevant that the dispute here concerns the existence of disability while the dispute in *Gendron* apparently concerned service connection. Both elements are necessary to establish eligibility for benefits. *Id.*

The summary affirmance in *Gendron* will dispose of Demarest's challenge only if "the precise issue[ ] [was] presented and necessarily decided" in that case. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The precedential significance of that summary affirmance is to be evaluated "in the light of all of the facts in that case." *Id.* at 177.

The procedural due process challenge made by Demarest also was presented by *Gendron*. The Supreme Court's affirmance of the district court's rejection of Gendron's challenge necessarily must represent one of two conclusions.

First, the Court may have concluded that Gendron did not have a constitutionally protectible [sic] property interest in the disability benefits sought. Second, the Court may have concluded that a property interest existed, but the fee limitation did not violate the veteran's right to procedural due process.

Under either theory, we must reject Demarest's challenge. He has established no greater entitlement than did Gendron because the existence of disability is as necessary to eligibility as the service connection of a disability. 38 U.S.C. § 331. Whether the Court concluded that no constitutionally protected property interest existed or that the limitation does not violate procedural process, its summary affirmance controls this case.

Demarest contends that the Fourth Circuit has discounted the precedential value of *Gendron* in *Adams v. Harris*, 643 F.2d 995 (4th Cir. 1981). However, the issue in that case was whether applicants for Social Security benefits have a constitutionally protectible [sic] property interest. *Id.* at 1001. The Fourth Circuit concluded that the Supreme Court's affirmance was not necessarily approval of the *Gendron* district court's analysis of that issue. *Id.* at 1001 n.4 We agree. That does not change our conclusion that whichever of the two possible theories the Court in *Gendron* approved, the affirmance in that case compels rejection of the fee limitation challenge here.

The VA's discussion of the effect of *Gendron* places great reliance on a decision of the Circuit Court of the District of Columbia. The VA notes that the decision was unpublished. It does not mention that the District of Columbia Circuit Rules prohibit citation of unpublished memoranda as precedent. That rule is noted on the page preceding the published reference to the case the VA cites, and that case is specifically listed as such a nonprecedential memorandum. *See* 574 F. 2d at 636-37. We have ignored the portion of the VA's brief involved. We remind government counsel that such references are inappropriate. *See also* 9th Cir. R. 21(c).

ORAL ARGUMENT ON SUMMARY JUDGMENT

Demarest contends that the district court erred in granting summary judgment without permitting oral argument. *See Dredge Corp. v. Penny*, 338 F.2d 456 (1964). Because Demarest did not request oral argument until after the motion was granted, and the local rules permitted him to do so before the motion was granted, his argument is without merit. *See id.* at 461-62.

That portion of the district court's summary judgment disposing of Demarest's challenge to the VA's handling of his disability claims is vacated and remanded for entry of judgment of dismissal for lack of jurisdiction. The remainder of the judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEPHEN H. DEMAREST, Plaintiff,	)	
-vs-	)	NO. C82-364T
UNITED STATES OF AMERICA; VETERANS ADMINISTRATION, Defendants.	)	ORDER

THIS MATTER comes on before the court upon defendants' Motion for Summary Judgment.

Having considered the entirety of the records and files herein, the court finds and rules as follows:

1. Once the movant has established that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, the burden of presenting evidence shifts to the non-movant.

2. Movant defendant has satisfied its burden of showing that it is entitled to summary judgment as a matter of law in the following:

(a) Plaintiff has not complied with the Federal Tort Claim Act requirements of 28 U.S.C.A. Section 2675. Accordingly, this court lacks jurisdiction to proceed on these claims.

(b) Plaintiff's claim that the restrictions of 38 U.S.C.A. Section 3404 violates [sic] his due process and equal protection rights (to pursue his service connected disability claims under 38 U.S.C.A. Section 3401) are without merit. *Gendron v. Saxbe.* 389 F.Supp. 1303 (C.D.Cal. 1975), *aff'd sub nom Gendron v. Levi*, 423 U.S.802 (1975)

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 22nd day of January, 1983.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

JUDGMENT ON DECISION BY THE COURT

FOR THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STEPHEN DEMAREST
vs.
USA

CIVIL ACTION ►
DOCKET NO. C82-364

JUDGMENT

This action came on for Consideration before the court, United States District Judge JACK E. TANNER presiding. The issues having been duly Considered and a decision having been duly rendered, it is ordered and adjudged . .

Defendant's motion for summary jdmt is GRANTED.

Dated at: Tacoma, Wash.

Date: 1/27/83
BRUCE RIFKIN, Clerk

/s/ Debby Harrison
Deputy *Clerk of the Court*

APPENDIX C

IN THE APPEAL OF
STEPHEN H. DEMAREST **SS 534 68 9510**

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION) **DOCKET NO. 83-08 904**
)
)
) **DATE AUG 9 1983**

THE ISSUE

1. Entitlement to a compensable rating for traumatic arthritis of the left hallux, postoperative status.

2. Entitlement to a compensable rating for residuals of a fracture of the spinous process of C7.

REPRESENTATION

Appellant represented by: American Red Cross

WITNESS AT HEARING ON APPEAL

Stephen H. Demarest, appellant

CONSULTATIONS BY THE BOARD

R. L. Shaw, Staff Legal Adviser

CONTENTIONS

The veteran and his representative contend, in substance, that the current noncompensable ratings do not reflect the degree of disability resulting from either service-connected disability. The veteran maintains that two Veterans Administration physicians and an independent radiologist concur that the veteran has swelling, deformity, and limited or no motion of the affected toe. He argues that a ten per cent (10%) rating is warranted under *either* Code 5281 or 5003. Concerning the

neck disability, the veteran and his representative argue that a rating of at least twenty per cent (20%) should be assigned under Code 5290 (limitation of cervical spine motion) or 5285 (deformity of a vertebral body). The veteran states that the evidence of record, including reports by Veterans Administration physicians and an independent radiologist, demonstrate the existence of residual disability. Noting that a later examination showed more severe findings than an earlier one, the veteran argues that the later of two conflicting evaluations must be accepted under 38 C.F.R. 4.7. The veteran claims that the adjudication of his claim has heretofore been arbitrary, capricious, and contrary to the evidence and law. He requests that all reasonable doubt be resolved in his favor pursuant to 38 C.F.R. 3.102.

THE EVIDENCE

The veteran had active military service from November 1976 to August 1980. Service medical records show that in March 1980 he underwent a partial ostectomy, fusion, and removal of a nonunited bone fragment from the left hallux. Records from a private medical facility show that in May 1980 he sustained a fracture of the spinous process of C7 in an automobile accident.

The veteran was examined by the Veterans Administration for compensation purposes in October 1980. He reported having stayed at a civilian hospital for two days following his automobile accident, followed by two days in a military hospital. He reported that since the accident he had gotten along well. He noticed some stiffness in the early morning as well as some cracking and popping on movement of the neck. He was taking no medications. Examination showed a full range of motion of the cervical spine without discomfort. There was no crepitus on movement. The veteran was able to walk on his toes. X-rays of the cervical spine showed anatomic alignment of the vertebral bodies and posterior elements, well-maintained vertebral disc spaces, and normal neural foramina. The findings were interpreted as normal. Pertinent diagnosis was historical evidence of fracture of the posterior spinous process of C7.

The veteran testified at a hearing in July 1982 before members of a rating board at the originating agency. He presented extensive argument expanding on the contentions summarized above. He described stiffness in the neck, especially after sleeping in an awkward position. He described himself as a physically active person and reported that three days of backpacking caused soreness down the middle of his neck and back afterwards. He had given up horseback riding and parachuting because of the risk of further injury to the neck. He described cracking and popping in the neck on movement. He reported having been told by doctors that although his neck motion may not show much limitation at his age, it may become more severe as he gets older. He described his toe as deformed and oversized. He reported an almost constant redness and discomfort, especially when wearing dress shoes or doing a lot of running. He stated that it had affected his balance and agility. A verbatim transcript of the hearing is of record. During the hearing the medical member of the hearing panel observed the veteran's disabilities and dictated his findings into the transcript. He described deformity of the first toe on the left foot,with moderate tenderness at the proximal joint. There was limitation of motion and inability to flex the first toe. There was a slight mass above the proximal interphalangeal joint. With respect to the neck, there was slight tenderness over the seventh vertebral spinous process. The veteran had no difficulty in rotating the neck from left to right or from right to left. There was slight limitation of flexion. There was difficulty in flexing the chin to the sternum. There was no referred pain or radiculitis to the extremities. There was a good hand grasp. The veteran made a fist without difficulty.

Received into evidence at the hearing were photocopies of two radiology reports from a private facility. In one report, current X-rays of the first left toe were compared with previous films from September 1978 which showed a well-corticated bony fragment close to the interphalangeal joint of the great toe associated with a well-corticated cystic erosion, osteophyte formation of the adjacent portion of the proximal phalanx, and a small osteophyte from the distal

phalanx. The bony fragment could not be detected on the later films. The changes in the adjacent phalanges were still evident. A current film of the cervical spine showed a normal curvature without evidence of subluxation or obvious fracture. The only equivocal abnormality was on an oblique film showing an apparent narrowing of the joint between the C6 and C7 masses, with some distortion of the lateral masses. The second report, dated several days later, showed a fracture of the spinous process of C7 with the dorsal segment inferiorly displaced. It was noted that on previous films the spinous process fracture was healed with some deformity. No vertebral body deformity was noted.

The veteran was examined by the Veterans Administration for compensation purposes in August 1982. He refused to discuss his C7 spinous process on the grounds that it was being reviewed by a Board in Washington, D.C. He complained that his left toe was deformed and disfigured, that it was bent inwards and downwards, that it was constantly inflamed and swollen, that it was irritable and caused discomfort, and that it affected agility and balance. He reported minimal discomfort in the great toe after running a 6.2-mile race. On examination the veteran was able to heel/toe walk without discomfort. There was an area of chronic bony swelling approximately 2 centimeters in size on the distal interphalangeal joint on the medial aspect of the dorsum of the left great toe. The distal interphalangeal joint appeared to be fused, with very little motion. The bony deformity was minimally tender and moderately erythematous. No X-rays were taken. Clinical impression was past history of *fracture*, distal interphalangeal joint, left great toe, with osteoarthritis.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

Where the minimum schedular evaluation requires residuals and the schedule does not provide a noncompensable evaluation, a noncompensable evaluation will be assigned when the required residuals are not shown. (38 C.F.R. 4.31)

Residuals of fractures of the spinous processes of the cervical spine are rated on the basis of limitation of motion of the cervical spine. The ratings schedule provides a ten per cent (10%) rating when the limitation of motion is slight. (Code 5290) An additional ten per cent (10%) can be assigned for demonstrable deformity of the vertebral body. (Code 5285)

Traumatic arthritis is rated as degenerative arthritis. Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion under the appropriate diagnostic codes for the specific joint or joints involved. When, however, the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes, a rating of ten per cent (10%) is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added, under this diagnostic code. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. In the absence of limitation of motion, a ten per cent (10%) rating will be assigned where there is X-ray evidence of involvement of two or more major joints or two or more minor joint groups. (38 C.F.R. Part 4, Codes 5003, 5010)

The rating schedule provides a ten per cent (10%) rating for severe unilateral hallux rigidus or unilateral hallux valgus following surgery, with resection of the metatatsal [sic] head, or if equivalent to amputation of the great toe. (Codes 5280, 5281)

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. (38 C.F.R. 4.7)

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be

resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

During service the veteran underwent fusion and removal of bony fragments in the area of interphalangeal joint of the left big toe.The earlier X-rays submitted by the veteran show a well-corticated bony fragment close to the joint, with osteoarthritic changes in the same area (the bony fragment was not seen on the most recent film). There is little, if any, movement in the fused interphalangeal joint, and an area of bony deformity over the joint has been reported by two examiners. Other residuals include moderate redness, moderate tenderness, and complaints of swelling. Since the underlying diagnosis is traumatic arthritis, the disability is properly rated under Diagnostic Codes 5010 and 5003, cited above. While a ten per cent (10%) rating can be applied under Code 5003 for limitation of motion of noncompensable degree, limitation of motion of the fused great toe is not specifically covered by any code and is not a criterion per se for evaluating disabilities of the great toe. Involvement of two or more major joints or minor joint groups has not been shown. The veteran's potential entitlement under Codes 5280 and 5281 has been considered, but we note that the surgery in service did not involve resection of the metatarsal head and that the residuals are not of such severity as to be equivalent to amputation of the great toe. We note in this regard that the veteran walks normally and that he does not have significant discomfort even after running a race.

During service the veteran sustained a fracture of the spinous process of C7. Current X-rays from a private facility show deformity at the fracture site consisting of inferior displacement of the spinous process. When informally observed by the medical member of the hearing panel, he was reported to have a normal range of rotation bilaterally. The examiner noted "slight" limitation of forward flexion. There

was slight tenderness over C7, and the veteran described occasional stiffness and soreness in the neck, especially on awakening or after strenuous exercise. A finding of slight limitation of motion would appear to support a ten per cent (10%) rating under Diagnostic Code 5290, but it is significant that the rating board physician noted that the veteran had "difficulty" flexing his chin to his sternum. This finding is somewhat incompatible in that flexion of the chin to the sternum would be impossible, not merely difficult, if limitation of motion were truly present. In any case, the veteran subsequently did not undergo the additional requested testing that would have clarified this point. Since the fracture site was on the spinous process rather than on the body of C7, a compensable rating of ten per cent (10%) cannot be assigned under Code 5285.

The Board has carefully reviewed all of the evidence of record together with the written and oral contentions presented on appeal. The evidence of record does not raise a reasonable doubt or otherwise warrant allowance of this appeal.

FINDINGS OF FACT

1. Traumatic arthritis of the left hallux, postoperative status, is manifested by osteoarthritic changes in the area of the interphalangeal joint, limitation of motion of the interphalangeal joint, deformity of the toe, moderate tenderness, moderate redness, and complaints of swelling.

2. Neither involvement of the metatarsal head nor functional impairment equivalent to amputation of the great toe has been demonstrated.

3. Residuals of a fracture of the spinous process of C7 consist of deformity of the process of C7, slight tenderness over C7, stiffness and soreness of the neck, and difficulty flexing the chin to the sternum.

4. Neither slight limitation of motion nor deformity of the body of C7 has been confirmed.

CONCLUSIONS OF LAW

1. A compensable rating for traumatic arthritis of the left hallux, postoperative status, is not warranted. (38 U.S.C. 355; 38 C.F.R. Part 4, Codes 5010, 5003)

2. A compensable rating for residuals of fracture of the spinous process of C7 is not warranted. (38 U.S.C. 355; 38 C.F.R. 4.31 and Part 4, Code 5290)

DECISION

Entitlement to a compensable rating for traumatic arthritis of the left hallux or to a compensable rating for residuals of fracture of the spinous process of C7 is not established. The appeal is denied.

/s/ Albert D. Tutera
ALBERT D. TUTERA

/s/ Roy G. Klepser, M.D.
ROY G. KLEPSER, M.D.

/s/ Elizabeth F. Parris
ELIZABETH F. PARRIS

APPENDIX D

Summary

Nearly 39 million men and women have served in the armed forces during wartime periods throughout the more than 200 years of United States history. Roughly nine of every ten of these servicemen and women served during periods of armed conflicts during the 20th century. Approximately 1.1 million people have sacrificed their lives in defense of their nation during times of war. The total number of veterans living in the U.S. and in Puerto Rico at the close of FY 1982 was about 28.5 million, nearly 24.3 million of whom were wartime veterans and more than 4.2 million of whom were veterans of peacetime service only.

Number of Veterans and Period of Service

The estimated veteran population as of September 30, 1982, is 28,522,000. This estimate of the number of veterans in civilian life reflects final 1980 Decennial Census counts of veterans, and includes former military personnel living in the U.S. and Puerto Rico only.

The total veteran population of the U.S. and Puerto Rico fell by some 151,000 during FY 1982. This slight decrease of 0.5 percent was the net result of the addition of 294,000 service personnel discharged from the armed forces, the entry into the military from civilian life of 34,000 who reenlisted, and the loss of 411,000 veterans who died during the fiscal year.

As a result of factors which are quite likely linked to the nation's rising unemployment rate and overall strained economic mood, more and more military personnel are making the choice to stay in the armed forces after their previous enlistment period has ended. This increase in immediate reenlistments results in fewer separations, and hence smaller numbers of new veterans enter the population. This trend will probably continue as long as the economic environment remains clouded.

In spite of the fact that the total veteran population decreased during FY 1982, increases were registered in the number of veterans for two periods of military service—the

Vietnam era and post-Vietnam era. The number of living veterans of the Vietnam era who served in no prior wars increased slightly from 8,138,000 on September 30, 1981, to 8,188,000 at the end of FY 1982. Post-Vietnam era veterans expanded in number to a total of 1,372,000, a rise of 189,000 during the year. This 16 percent increase would have been even larger had it not been for Public Law 96-342. Veterans from all other periods of military service showed declines during the year. Most notable was the deaths of some 281,000 World War II veterans. This group is still the largest sector of the veteran population, however, numbering about 11.4 million and comprising about 40 percent of all veterans as of the end of FY 1982. Veterans whose only wartime service occurred during the Vietnam era accounted for 29 percent of all living veterans, and Korean conflict veterans with no World War II or Vietnam service (3,818,000) constituted 13 percent. Veterans of World War I number 368,000. Peacetime veterans who served only between the Korean conflict and the Vietnam era dropped marginally to 2,888,000.

Age of Veterans

The median age of veterans in civilian life as of the end of September 1982 was 50.8 years. Less than 3 percent of all living veterans were under the age of 25 years, whereas 12 percent were at least 65 years old.

As the veteran population continues to decline in size throughout the coming years, the median age of veterans will gradually increase. An integral part of this aging process will be the movement of significant numbers of World War II veterans into the age group 65 years old and over. Before the turn of the century, it is expected that fully one of every three living veterans will fall in this senior age range.

Female Veterans

The estimated number of female veterans is 1,218,000 at the end of FY 1982, a total representing some 4.3 percent of all veterans in civilian life. This estimate of the female veteran population is markedly higher than any previous estimate. This higher estimate is based on the findings of

the 1980 Decennial Census. The count of female veterans grew by about 18,500, or by 1.5 percent, during the 12 months ending September 30, 1982. This growth, which stands in contrast to the decline in the overall veteran population, is very likely to continue as long as the women's share of all active duty military personnel remains at or near its present level. Women currently comprise nine percent of all active duty military personnel, a proportion decidedly greater than the less than two percent they represented a decade ago.

World War II female veterans comprised 37 percent (448,000) of the female veteran population, while female veterans of the Vietnam era made up 26 percent (320,000). Korean conflict (only) female veterans accounted for 8 percent (102,000) of the overall number of female veterans, and female veterans with Korean conflict and Vietnam era service (15,000) comprised over one percent, and female veteran survivors of World War I constituted just one percent (11,000). Women who served on active military duty only between the Korean conflict and the Vietnam era accounted for seven percent (89,000) of all female veterans. The major difference between the period of service distribution of female veterans and that of all veterans is the proportion of ex-servicewomen who participated only in the post-Vietnam era. Whereas female veterans of the Post-Vietnam era represent 19 percent of all female veterans, Post-Vietnam era veterans, male and female, comprise only five percent of all living veterans. This factor is the primary reason why the median age of female veterans (45.5 years) is decidedly below that of all veterans (50.8 years); i.e., former military personnel whose only service began after the Vietnam era ended (May 7, 1975) would generally be expected to be much younger than veterans of any other period of service. The comparatively large influx of post-Vietnam era female veterans into the veteran population is also the predominant reason for the growth of the percent of the veteran population comprised of females. During FY 1982 alone, nearly 21,000 women were added to the post-Vietnam era veteran population after their separation from the armed forces. This steady flow of new (and young) female

veterans has resulted in the recent decline in the median age of female veterans overall.

Veterans and Their Families

Living veterans are only part of the total number of potential recipients of VA benefits. As of September 30, 1982, there are an estimated 22.0 million spouses of living veterans, 20.2 million dependent children, and 10.0 million other family members. Although only a small proportion of these dependents are likely to seek benefits directly from the VA at any time in the future, benefits paid to veterans will indirectly affect the socioeconomic well-being of a great number of their dependents. Former dependents of deceased veterans number about 3.1 million at the end of FY 1982. The 2.6 million widows and widowers, 356,000 dependent children, and 103,000 dependent parents of eligible deceased veterans raise the total population of potential beneficiaries to some 83.8 million, or about 36 percent of the resident population of the United States.

Appellate Review

Claimants for VA benefits who are not satisfied with determinations made by field offices may file a written notice of disagreement with the office taking the action. If, after reviewing the case in light of the claimant's disagreement, the field office is not able to grant benefits sought, it sends the appellant a statement of the case. This statement outlines the issue, evidence of record, pertinent law and regulations, and the reason for the decision. If the appellant, after reading the statement of the case, still disagrees with the field office, he or she may submit an appeal to the Board of Veterans Appeals (BVA). Again the field office reviews the case. If still unable to resolve the appeal to the satisfaction of the claimant, the field office sends the case to the BVA for review and final decision.

A heavy volume of appeals continued through 1982—surpassing the record level of 1981. According to available records, only 1949 and 1950—the peak years following World War II—had greater numbers of new appeals.

Adding new appeals to those carried over from 1981, the 1982 appellate workload was more than 124,000 cases. About 31,000 appeals were resolved in field offices—another 35,800 were decided by the Board of Veterans Appeals. There were more than 61,300 final dispositions of appeals—over 21 percent of which were allowances of benefits sought by claimants.

The VA employs two data processing systems to provide positive case management and control of appeals. When a claimant files a notice of disagreement, the Department of Veterans Benefits (DVB) field station creates an appeal record in VARMS (Veterans Appeals Record Management System). VARMS then tracks the appeal until its final disposition.

The BVA, through VARMS, holds its caseload at a level that permits optimum operations. Each month the Board determines the number of appeals to be called in. DVB, using VARMS, selects the cases, oldest first, and sends them to Washington. These call-up procedures have held average response time in Washington to about 100 days. Also, by keeping appellant records until the BVA calls for them, field offices are better able to serve veterans and other claimants by responding to inquiries, assisting them in other matters, and in developing their appeals.

Average overall response time to appeals, measured from the date of notice of disagreement until BVA decision, reached 483 days (over 16 months) at the end of FY 1982. This is up from 443 days at the start of the year. The biggest increase was the time appeals were held for call-up by the Board. We estimate this delay to be about five months.

Appellants, their representatives, and other case advocates continued to show great interest in claims for disabilities involving Agent Orange, exposure to radiation, and incarceration as prisoners of war. The Board has made each of these categories a specialty area and assigns them to one of the sections designated to handle them. This permits the Board to develop expertise in these sensitive areas and to ensure consistency in the application of laws and regulations. In FY 1982 the Board received 380 appeals

involving Agent Orange (up from 288 in 1981), 168 involving radiation (down from 205), and 303 from former prisoners of war or their beneficiaries (up from 251 in 1981).

The BVA held 1,503 personal hearings for appellants in FY 1982, 1,001 in Washington and 502 before traveling sections of the Board sitting in 38 field stations. Up until several years ago, about 70 percent of the appellants who asked for hearings appeared for them. In FY 1982 that dropped to less than 49 percent. A year earlier the rate was 56 percent.

In 1981 the BVA started a program to reduce the time required for personal hearings before the Board. When possible, and when requested by the appellant, the Board provides a copy of hearing recordings to appellants in lieu of transcriptions. This procedure, satisfactory to more than 55 percent of appellants with formal hearings in Washington, has reduced the Board's response time in those cases by four to six weeks. This procedure applies only to hearings held before the Board in Washington. All travel board hearings continue to be transcribed.

At the end of FY 1982, the waiting time on the hearing docket was about ten weeks, the same as at the end of FY 1981. Unfortunately, most appellants who fail to show up for their scheduled hearings do not notify us in time to schedule a replacement.

The portion of appellants who chose to be represented by one of the veterans' service organizations continued to grow. Our records for FY 1982 show that more than 86 percent selected one of the accredited organizations; just over two percent used attorneys or agents; and less than 12 percent chose to pursue their appeals without representation. Appellants handling their appeals without representation has declined steadily from about 22 percent to less than 12 percent over the past decade.

At the end of fiscal year 1982, there were more than 47,600 appeals in process in VA field stations. About 36 percent of these were in the initial, (notice of disagreement)

stage, the remainder in the final stages of field processing. Including 12,115 cases on the BVA docket, the total number of appeals pending at the end of FY 1982 was 59,776, up 4,333 from a year earlier.

Headed by a Chairman, a Vice Chairman, and two Deputy Vice Chairmen, the Board had a complement of 16 full sections. To help reduce the large backlogs of appeals, the Chairman operated a skeletal seventeenth board section within budgetary limitations for 16 sections. As a result the BVA produced 35,771 decisions, which is a record number. Among the 17 sections there were 33 legal and 15 medical members. Supporting the sections was a medical adviser, 107 staff attorneys, and an administrative service. Excluding overtime, the Board had an average employment level of 343 during the year.

Other professional support available included advisory medical opinions from the Chief Medical Director and legal opinions from the General Counsel. In addition, under the authority of Section 4009, Title 38, U.S.C., the Board requested 202 opinions from independent medical experts who were not VA employees.

The Freedom of Information Act requires the BVA to produce an index of its final decisions on appeals and to make the decisions available to the public. Developed in compliance with the Act, AIRS (Appellate Index and Retrieval System) includes quarter and cumulative annual subject indexes on microfiche and BVA decisions, stripped of personal identifiers, on microfilm. Appellants and others interested in decisions of the Board are able to check these indexes to locate specific type cases. They can then request copies of the decisions they want. At the end of FY 1982, AIRS indexes covered the period from July 1, 1977 through June 30, 1982—about 170,000 BVA decisions.

APPENDIX E

STATEMENT OF JOHN F. TERZANO
LEGISLATIVE DIRECTOR
OF THE
VIETNAM VETERANS OF AMERICA
ACCOMPANIED BY
DAVID F. ADDLESTONE
AND
BARTON F. STICHMAN

BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
COMMITTEE ON VETERANS AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

JULY 26, 1983

* * *

V. THE ATTORNEY FEE LIMITATION

VVA urges the Congress to take action to eliminate the ten dollar fee limitation that attorneys may charge to handle VA claims. The limitation deprives veterans of a basic right that all citizens have — the freedom of choice to seek professional assistance to help them sort through a complicated legal system. They should have the opportunity to go into the marketplace and pay for the legal services they need, without the statutory barrier that lingers from another historical era and set of circumstances. There can be no doubt that the ten dollar fee limitation acts to almost completely exclude lawyers. It is a perfect example of inappropriate and unnecessary government regulation to deny citizens a free choice in the market place. The retention of the limitation is usually justified by reference to some generalized negative effect lawyers would have on the VA.

Some believe that removal of the fee limitation and the introduction of lawyers into the VA system would harm the VA's decision-making process. Arguments against such representation suggest that lawyers would unnecessarily complicate the process, create an adversary relationship between veterans and the VA, and that simply suggesting

the notion of lawyer representation before the VA is an indictment of the current adjudication system.

Taking the last point first, to suggest that lawyers should be able to represent veterans who want lawyers before the VA does not mean that the current system is either unfair, indifferent or a failure. On the contrary, the right to choose a representative does not depend on any shortcomings of an adjudicative system. Rather, the right to seek legal assistance should stand alone as an option for all citizens. The ten dollar fee limitation serves as a barrier to lawyers created by government regulation. Eliminating the prohibition would open the system to more free choice and a free market.

VVA sincerely believes that the introduction of lawyers and other legally trained professionals into the VA will improve the system. There are several specific benefits we feel that lawyers can add to the system. Let it be clear,—however, we are not advocating the replacement of service organization service representatives with lawyers. We are advocating that veterans receive the benefit of an additional option.

The most important function lawyers can serve at the VA, as they have at other federal agencies, is that of mediator between the veterans and the agency. The typical lawyer who advocates before an administrative agency does not fit the stereotypical image of adversarial trial-type litigator, the image created by some who oppose lawyer participation at the VA. Persons familiar with federal agency practice know that the role of an administrative advocate is far different from a courtroom litigator. The administrative lawyer frequently acts to explain a complex agency to a client, attempts to clarify issues for both the client and the agency, and tries to resolve claims with as little acrimony as possible. The reason why lawyers would function this way is obvious. The VA is not an adversary process, and there is no attorney on the other side to argue against.

An even more telling point against the argument that lawyers will somehow infect the system is to look at the BVA

itself. The BVA has fifteen sections each with three members. Fourteen of the fifteen sections have two of the three members who are lawyers. In the fifteenth section all three members are lawyers. In addition, each section has seven or eight staff attorneys. In short, the entire decision-making process is monopolized by attorneys. Everything is done in legalistic terms. To argue that allowing the veteran to have a lawyer will infect the process with legalism ignores the reality of the process as it now exists.

Lawyers have been trained to approach issues in a certain way and that method is used to adjudicate issues at all federal agencies and in the courts. We have been told that the presentation of briefs to the BVA, which we do in every case, has helped the members better understand the legal issues and the factual record. Given the incredible caseload at the BVA, clarification of issues will assist the BVA and at the same time give the veteran informed access to the system.

There is another result from the introduction of lawyers that will be beneficial to veterans and the agency. It is common to all lawyer-client relationships, and that is when a lawyer advises a client that he or she does not have a meritorious case. We have found that providing a client with frank advice about the chances of success is welcomed by the client who never before knew the real merits of the case. This is not to say that disgruntled clients will not seek another, more favorably inclined lawyer but the point bears consideration. In this way, lawyer participation could significantly reduce the caseload of the agency on grounds that are sound and in a manner that leaves the client with a sense that a full and fair consideration by an independent professional have been given in the case. S. 636 and the House bills still place unduly strict limits on attorneys fees. For example, some provisions keep the ten dollar limit until the VA process has been exhausted, and the limit for court work is still unrealistically low. VVA feels that these provisions, while a welcome change from the past, are not sufficient to assure that veterans will have the freedom to

choose their own representative and have legally trained counsel assist in making an early record for cases that are likely to end up in court. We would be happy to assist the Committee staff revise these provisions.

Office - Supreme Court, U.S
FILED
MAR 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1176

In the Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN H. DEMAREST, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
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QUESTION PRESENTED

Whether the $10 limit in 38 U.S.C. 3404(c) on fees for representatives of veterans seeking disability benefits, which was enacted to protect the benefits from depletion, violates the Due Process Clause of the Fifth Amendment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 718 F.2d 964. The order of the district court (Pet. App. B1-B2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1983. The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following his honorable discharge from the United States Air Force in 1980, petitioner filed two claims for disability benefits with the Veterans' Administration (Pet. App. A1, C2). He was represented by the American Red Cross before the Board of Veterans Appeals (*id.* at C1).

After consideration of his application and a physical examination, the VA determined that petitioner's injuries, although service-connected, were not disabling to a compensable degree, and therefore it denied his claims (*id.* at A1, C1-C8).

2. Petitioner brought this action in the United States District Court for the Western District of Washington. He challenged the VA's handling of his claims for benefits and sought damages under the Federal Tort Claims Act, 28 U.S.C. (& Supp. V) 2671 *et seq.* He also argued that his right to procedural due process was violated by 38 U.S.C. 3404(c), which limits to $10 per claim the amount of fees payable by a veteran to an attorney or agent for representation in seeking benefits before the VA.[2] The court granted summary judgment for the respondents. Relying on this Court's summary affirmance upholding the constitutionality of 38 U.S.C. 3404(c), see *Gendron* v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975) (three-judge court), the district court held that petitioner's constitutional arguments were without merit (Pet. App. B1). In addition, the court held that, because petitioner had failed to comply with the statutory prerequisites for suit under the Federal Tort Claims Act, there was no jurisdiction over those claims (Pet. App. B1).

3. On petitioner's appeal, the court of appeals held that *Gendron* controls the issue of the constitutionality of 38 U.S.C. 3404(c), and therefore it affirmed the district court's judgment in this respect (Pet. App. A3-A6). The court also found that petitioner had not properly invoked jurisdiction under the Federal Tort Claims Act and that the district court lacked jurisdiction to review the VA's handling of

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[2]This limitation applies to attorney's fees but is inapplicable to reimbursement for expenses incurred in connection with a claim. See 38 C.F.R. 14.634(b).

petitioner's disability claims in light of the preclusion provision in 38 U.S.C. 211(a) (Pet. App. A2-A3); because the correct disposition was to dismiss the complaint for lack of jurisdiction rather than to enter summary judgment, the court of appeals vacated this portion of the district court's judgment and remanded for entry of a judgment of dismissal (*id.* at A6).

ARGUMENT

1. Petitioner contends (Pet. 5-16) that the $10 fee limitation prevents him from retaining counsel and thus violates his right to procedural due process. The courts below correctly rejected this contention on the authority of *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal.) (three-judge court), aff'd mem. *sub nom. Gendron* v. *Levi*, 423 U.S. 802 (1975). Furthermore, as in *Gendron*, there is no need in the instant case for plenary review by this Court. Accordingly, the petition should be denied.

a. In *Gendron*, this Court summarily affirmed the decision of a three-judge district court holding that the $10 fee limitation in 38 U.S.C. 3404(c) does not violate the requirements of procedural due process. As discussed in our Motion to Affirm in *Gendron* (at 3-4),[2] that decision was consistent with the decisions of every court that had considered the question. See also *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), vacated and remanded for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (table). Moreover, we demonstrated in *Gendron* (Mot. to Aff. 2-7) that since 1862 Congress has imposed limits on such fees in order to ensure that governmental benefits are received, without substantial depletion, by the beneficiary for whom

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[2]Copies of the Jurisdictional Statement and the Motion to Affirm in *Gendron* are being sent to counsel for petitioner.

they are intended;[3] that expert assistance from service organizations is available to veterans without charge in preparing and presenting their claims; and that this system, in the context of the nonadversarial procedure for determining disability benefits, fully satisfies procedural due process.[4] Finally, we showed (Mot. to Aff. 8-9) that in any event a veteran has no property interest in an unproven claim to benefits and hence that no right to procedural due process attaches.[5]

The Jurisdictional Statement in *Gendron* presented issues of both the constitutional adequacy of the procedures under 38 U.S.C. 3404(c) and the existence of a cognizable

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[3]The history and development of these limitations is traced in the Appendix to our Motion to Affirm in *Gendron*. See also *Hines* v. *Lowrey*, 305 U.S. 85, 88-90 (1938); *Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pts. 1 & 2, at 458-459, 500-501 (1973) (hereinafter cited as *1973 Hearings*).

[4]As the district court had held in *Gendron* (389 F. Supp. at 1307):

> Congress, having in mind the availability to veterans of experienced lay persons to represent them in applying and qualifying for benefits, along with the facilities provided by the Government, as set forth in Section 3402, Title 38, U.S.C., appears to have concluded that the provisions for the representation of veterans was quite adequate. More elaborate procedural requirements involving adversary hearing would make proceedings necessarily burdensome and lengthy to the end that there would be long delays to the detriment of the veterans, as well as the creation of a great drain on the funds provided for their comfort. Having in mind the effective measures it had taken for the representation of veterans without charge, Congress could properly limit to a nominal sum the fee paid to one representing a veteran as an agent or attorney without prejudicing the veterans' rights.

[5]The district court in *Gendron* had "conclude[d] that the plaintiff herein has no property interest in an unproven claim or in the fact the statute provides for benefits to veterans who may be able to qualify therefor" (389 F. Supp. at 1306).

property interest in unproven claims for veterans' benefits.[6] Thus, the court of appeals in this case correctly recognized (Pet. App. A5) that, whether the Court's affirmance in *Gendron* rested on the sufficiency of the procedures under Section 3404(c)[7] or the lack of a property interest in unproven benefit claims,[8] the decision in *Gendron* is dispositive of petitioner's procedural due process argument. Petitioner has the same interest in claimed benefits that Gendron did, and his application was subject to the same procedures. Because this Court's summary affirmance in

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[6]See J.S. 4, *Gendron* v. *Levi*, *supra*:

QUESTIONS PRESENTED

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

[7]See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971); *Vitek* v. *Jones*, 445 U.S. 480, 497-500 (1980) (Powell, J., concurring).

[8]See also *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-11 (1979); *Lavine* v. *Milne*, 424 U.S 577, 586 (1976); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 576, 577 (1972); *Richardson* v. *Perales*, 402 U.S. at 407; *Banks* v. *Block*, 700 F.2d 292, 296-298 (6th Cir. 1983), cert. denied, No. 82-7015 (Oct. 31, 1983).

Gendron constitutes a ruling on the merits,[9] the courts below correctly held that it controls this case.[10]

b. Nor is there any reason for the Court to revisit its conclusion in *Gendron* that 38 U.S.C. 3404(c) does not violate procedural due process and that the issue does not warrant plenary consideration. The basic due process analysis applied by the three-judge district court and sustained by this Court in *Gendron* has not been changed by subsequent decisions of the Court, and indeed the majority of the cases cited by petitioner (Pet. 5-16) antedated *Gendron* and were relied on by the claimant in that case.[11]

Petitioner contends (Pet. 8-9), however, that veterans' disability claims have become more complex in the nine years since *Gendron*. Whatever the correctness of this contention, it does not assist petitioner, who concedes that his claims were "relatively routine" (Pet. 11). More importantly, any changes in the disability claims system necessitated by such considerations should be left to Congress to resolve as a matter of policy. See *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 11-12.

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[9]See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

[10]Petitioner seeks (Pet. 8-9 n.6) to distinguish his case on the ground that the injuries here, unlike in *Gendron*, were service-connected. But, as the court of appeals correctly observed (Pet. App. A4), this attempted distinction is without legal significance. Both petitioner and Gendron were denied benefits for failure to meet the statutory requirements, and both challenged the denial on procedural due process grounds; that the specific reason for ineligibility was different in each instance does not alter the governing due process analysis or indicate that a different constitutional standard is applicable here.

[11]In addition, as noted in our Motion to Affirm in *Gendron* (at 3-4), the Court had denied certiorari in other cases challenging the validity of the fee limitation in 38 U.S.C. 3404(c) or predecessor statutes.

Indeed, as petitioner acknowledges (Pet. 15), Congress on several recent occasions has considered bills that would amend the fee limitation provision in 38 U.S.C. 3404(c).[12] One such bill was passed by the Senate in the last session of Congress and is currently pending in the House. S. 636, 98th Cong., 1st Sess. (1983); see S. Rep. 98-130, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. S8497 (daily ed. June 15, 1983); 129 Cong. Rec. S1895 (daily ed. Mar. 1, 1983). The fact that Congress has not, to date, enacted the proposed bills does not, as petitioner suggests (Pet. 15), indicate the need for this Court's intervention. On the contrary, the fee limitation is under active consideration by Congress, which thus far has concluded that the existing system is fair and adequate[13] and should not be amended to adopt any of the alternatives that have been advanced.

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[12]In addition, in 1967 the Veterans' Administration, at the direction of the President, established a United States Veterans Advisory Commission to make a comprehensive study of the benefits system. Based on extensive review and public hearings, the Commission recommended that no change be made in the fee limitation provision. See *1973 Hearings 501-502.*

[13]See S. Rep. 98-130, *supra*, at 23, 54; S. Rep. 97-466, 97th Cong., 2d Sess. 25, 49-51, 52, 53, 102-103, 136-139 (1982); *Veteran's Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposal: Hearing on S. 636 Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 67, 109, 117, 218-219, 250-257 (1983) (hereinafter cited as *1983 Hearings*). As the Senate Committee on Veterans' Affairs stated (S. Rep. 97-466, *supra*, at 25, 49-50):

> [T]he Committee[] [has] abiding respect * * * for the high quality of representation offered by the veterans' service organizations * * *.
>
> * * * * *
>
> [A] very effective network of nonattorney resources * * * has evolved in the absence of significant attorney involvement in VA claims matters. * * * It is widely recognized, as the VA noted in its agency report * * *, that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim" * * *.

Recent statistics indicate that the percentage of allowed claims is virtually the same for veterans represented by service organizations and those represented by attorneys. See *1983 Hearings* 67.

2. Petitioner also asserts (Pet. 17-20) that the fee limitation provision in 38 U.S.C. 3404(c) violates substantive due process. Because, as he acknowledges (Pet. 17 n.12), this contention was not presented in the courts below, it should not now be considered. See, *e.g.*, *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's argument is without merit. As explained in our Motion to Affirm in *Gendron* and summarized above, the fee limitation is justified by the congressional policies of assuring that benefits are not depleted through payments to counsel and protecting veterans and their families from aggressive or unscrupulous attorneys. Congress has consistently adhered to these policies for more than a century. Especially in the context of the nonadversarial veterans' benefits system in which effective representation is provided without charge by accredited service organizations, the longstanding limitation on fees does not violate substantive due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-1176

IN THE

Supreme Court of the United States

October Term, 1983

STEPHEN H. DEMAREST,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The government declines to analyze the merits of the cases cited by petitioner, relying almost solely on *Gendron* and the government's June 1975 Motion to Affirm in that case. But while the government argues that the "distinction is without legal significance," it concedes, as it must, that *Gendron* is factually different from this case because Demarest's injuries, unlike Gendron's, were service-connected. Brief in Opposition at 6, n.10.

More importantly, the government's argument that the "majority of cases cited by petitioner antedated *Gendron*" is a frail thread that does not support the government's almost total refusal to evaluate law and precedent. Although some of the cases cited by petitioner were decided before *Gendron*, that merely demonstrates that this Court's summary affirmance in *Gendron* should not be considered by this Court to be controlling or to foreclose plenary review in this case. Indeed, this Court's own conflicting cases predating the summary affirmance in *Gendron* only serve to emphasize the need for this Court now to resolve this conflict. Further, the consensus of the post-*Gendron* cases makes clear that premises of *Gendron* are incorrect and have not been accepted generally in the federal courts in similar contexts. This Court

should not let the government sweep constitutional principles and the rights of veterans under the rug of a summary affirmance.

2. The government places great weight on the paternalistic rhetoric of the *Gendron* district court decision. Brief in Opposition at 4, n.4. This Court has never endorsed those views. Nor should it do so. The denial of the individual's right to use his or her own funds to pay a lawyer and thus to obtain legal counsel is at odds with traditions of fair procedure that are basic to our Constitution. No self-serving assertions of paternalistic purpose should obscure that the challenged statute offends fundamental fairness and due process. Each veteran is entitled to decide for himself or herself whether to retain counsel, accepting the clear advantages and any disadvantages of that decision.

3. The government does not deny that the $10 fee limitation effectively precludes veterans from retaining counsel with their own funds. Although not disputing the increased complexity of many claims, the Brief in Opposition at p. 6 unfairly asserts that such complexity is irrelevant because, or so it argues, petitioner "concedes that his claims were relatively routine," citing the Petition at 11. This argument does not merely ignore the complexities of Veterans Administration procedures and the government's own extensive reliance on counsel in the claims process. See Petition at 13. It also distorts and misuses petitioner's statement. The Petition stated: "Even in relatively routine disability cases like that of Demarest, *many complex issues of regulatory law and proof are presented* . . . ." Petition at 11.

4. The government argues that this Court should defer to pending legislation, but it is this Court's responsibility to declare that the existing statute offends due process. To be sure, as the government urges, Congress has the power to revise the offending statute. But it cannot be disputed that Congress–for complex political reasons–continues to be unable to resolve this archaic anomaly.

5. A grateful Nation should not select out disabled veterans for a denial of retained counsel. Indeed, except for veterans with disability claims before the Veterans Administration, all those who contest government action in other agency proceedings take for granted the right to retain their own counsel and to pay for such counsel with their own funds. One surely must wonder why disabled veterans alone are singled out for deprivation of this important right of choice available to all others in administrative proceedings. Such a lack of fair treatment to those citizens who have most selflessly served their country's best interest is a disservice to the veterans, to each of us and to the Constitution of the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

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Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

AMICUS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the denial of retained counsel to applicants for veterans' benefits, imposed by a $10.00 limit on attorneys' fees under 38 U.S.C. §3404 and enforced by criminal sanctions, is offensive to the Due Process Clause of the Fifth Amendment of the United States Constitution.

INTEREST OF AMICUS FEDERAL BAR ASSOCIATION

The Federal Bar Association (FBA) is an association of more than 15,000 attorneys whose practice and professional interests focus upon various aspects of federal law, including those related to veterans of the armed services. The mission of the FBA is to advance the science of jurisprudence and to promote the welfare, interests, education, and the professional growth and development of the members of the federal legal profession. The FBA is composed of 105 Chapters throughout the world, with 14 National Councils comprising 85 Substantive Law Committees, integrating the individual members, and their particular fields of interest, into the whole of the organization.

At its 1983 Convention, the Federal Bar Association adopted a resolution calling for the repeal of the fee limitation contained in Title 38 U.S.C. §§3404 and 3405.

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IN THE

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AMICUS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUMMARY OF ARGUMENT

Over a century ago, Congress enacted §§3404 and 3405 to Title 38 of the U.S. Code. These sections impose a $10.00 per claim limitation on the amount of attorneys' fees payable for representing a veteran in a disability claim before the Veterans Administration. This limitation effectively denies a claimant the ability to retain counsel in disability compensation proceedings before the Veterans Administration. Amicus agrees with petitioner's argument that the ability to retain counsel is a critical component of procedural due process in an administrative proceeding involving a claim for benefits. Accordingly, the $10.00

limitation on attorneys' fees deprives claimant of procedural due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Judicial deference to the Congressional decision to limit attorneys' fees would be inappropriate because the issue here is one of constitutional proportion. Accordingly, this Court is being properly asked to exercise its Article III authority to consider the constitutionality of the $10.00 cap on attorneys' fees.

Deference to Congressional judgment would also be inappropriate because Congress never specifically considered the constitutionality of the limitation on attorneys' fees. When it enacted §§ 3404 and 3405, Congress considered these statutes exclusively in terms of protecting veterans from unscrupulous attorneys.

Proposed legislation, presently stalled in the House of Representatives, would amend the limitation on attorneys' fees. However, the broader purpose of the bill is to permit judicial review of final determinations by the Veterans Administration. Although Congress has extensively considered the constitutionality of the bar to judicial review, the proposed amendment to the cap on attorneys' fees has been viewed only in terms of implementing judicial review. Congress did not specifically consider the constitutionality of the attorneys' fee limitation. Accordingly, this case falls within the category of cases recognized by this Court as exceptions to the customary judicial deference to Congressional judgment.

ARGUMENT

I. DEFERENCE TO CONGRESSIONAL JUDGMENT IS INAPPROPRIATE BECAUSE THE ISSUE IN THE PRESENT CASE IS ONE OF CONSTITUTIONAL PROPORTION.

It is axiomatic that the role of the Supreme Court is to safeguard the rights and privileges guaranteed by the Constitution. Thus, in the seminal case, *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court established that Article III authorizes the Judiciary to review the conduct of coordinate branches of government to determine the constitutionality of legislative action. Thus, the doctrine of separation of powers may sometimes require judicial action to check the excesses of the other branches of government[1] Accordingly, the Court may consider the constitutionality of a particular statute or portion thereof.

In the present case, petitioner is asking the Court to consider the constitutionality of the $10.00 cap on attorneys' fees contained in 38 U.S.C. §§3404 and 3405. This request is of constitutional proportion. In granting the request, the Court would therefore exercise its proper judicial function and need not defer to Congressional judgment.

II. DEFERENCE TO CONGRESS IN THE PRESENT CASE IS UNWARRANTED BECAUSE CONGRESS HAS FAILED TO SPECIFICALLY CONSIDER THE CONSTITUTIONALITY OF THE ATTORRNEYS' FEE LIMITATION.

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court considered the constitutionality of Congress' failure to amend §3 of the Selective Service Act to

[1]This aspect of the Doctrine of Separation of Powers reveals itself in the fact that the Senate is authorized under Article I, §3, to impeach the president; the president may veto legislation enacted by Congress, and Congress may restrict the jurisdiction of the lower federal courts.

provide for registration and conscription of women pursuant to President Carter's request. As a preliminary matter, the court addressed its authority to consider the matter, observing that "the call to judge the constitutionality of an act of Congress is the greatest and most delicate duty that this Court is called upon to perform." (Quoting Justice Holmes in *Blodgett v. Holden*, 275, U.S. 142 (1927).) The Court determined that the customary deference accorded Congress is appropriate only when Congress specifically considered an act's constitutionality. The Court deferred in *Goldberg* after concluding that Congress had extensively considered the constitutionality of the gender-based discrimination underlying §3 of the Selective Service Act.[2]

The standard enunciated in *Goldberg* as to when the Judiciary should refrain from infringing on the legislative province precludes deference in the instant case. Congress never specifically considered the constitutionality of the cap on attorneys' fees. Report to Accompany S-349, 97th Cong., 2d Sess. (June 8, 1982), p. 49. Indeed, that anomalous provision, dating back to the Civil War, was clearly intended to protect generally indigent veterans from unscrupulous attorneys when pursuing claims before the Veterans Administration. *Id.*

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[2]The court also determined that deference to Congress was appropriate because the question of registering women for conscription involved Article I, §8 powers to raise and regulate an able militia. It should be noted that this rationale is not applicable to the present case. Unlike a constitutional challenge to military regulations governing appearance and conduct, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1974), and unlike the issue in *Golberg*, this case involves the ability of veterans to adequately pursue their claims in an adversarial proceeding before the Veterans Administration. In no way does the issue in this case implicate Congressional Article I, §8 powers.

Congress has made several attempts to enact legislation amending the attorneys' fee limitation. These efforts have failed repeatedly. The current proposed legislation is primarily concerned with eliminating the statutory bar to judicial review of Veterans Administration determinations in connection with individual benefits claims.

While the Senate held extensive hearings on the bill to consider the constitutionality of the statutory bar to judicial review, neither it nor the House of Representatives, where the bill has repeatedly stalled, specifically addressed the constitutionality of the attorneys' fee limitation itself. In fact, the articulated rationale for amending the atttorneys' fee provision is to implement judicial review.[3] *See generally,* Report of the Senate Committee on Veterans Affairs to Accompany S-349, No. 97-166, 97th Cong., 2nd Sess., June 8, 1982. As expressed in the Committee Report, amending the cap on attorneys' fees would enable counsel to be present and to develop a comprehensive administrative record for judicial review. Report to Accompany S-349, *supra,* at pp. 49-51.

[3]The proposed amendment was also discussed in terms of its overall impact on already existing agency procedures.

CONCLUSION

Amicus agrees with petitioner's argument that the limitation on attorneys' fees is an unconstitutional violation of the due process clause for the reasons discussed by petitioners in their petitition for certiorari. Congressional failure specifically to consider the constitutionality of the attorneys' fee limitation brings this action within the category of cases which are exceptions to the customary judicial deference to Congressional judgment, and the Court should therefore not defer to Congress in this case.

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